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No. 04-5462

IN THE

Supreme Court of the United States

RONALD ROMPILLA,

Petitioner,

vs.

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Did the Pennsylvania Supreme Court unreasonably apply *Simmons* v. *South Carolina* by interpreting it in the same way as the four dissenting Justices of this Court did four years later in *Kelly* v. *South Carolina*?

2. Does the Sixth Amendment prohibit an attorney managing a capital case with limited resources from terminating a line of investigation into mitigating circumstances when preliminary investigation gives him a reasonable basis to believe that particular inquiry will be fruitless?

3. Should the power to decide how much states must spend to comply with the Sixth Amendment be delegated to the American Bar Association?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves the proper interpretation and application of 28 U. S. C. § 2254(d), as enacted in the Antiterrorism and Effective Death Penalty Act of 1996. Congress enacted this

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

law, as its name states, to make the death penalty effective in the United States. The purpose remains frustrated because many federal courts continue to set aside reasonable state judgments merely because they disagree with them or because of changes in the law after the state decision. Both of these are illegal after AEDPA, and contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Sixteen years ago, Ronald Rompilla was sentenced to death for the murder of James Scanlon in Allentown, Pennsylvania. See *Commonwealth* v. *Rompilla*, 539 Pa. 499, 504, 653 A. 2d 626, 628 (1995). (*Rompilla I*). Rompilla stabbed Mr. Scanlon repeatedly, set him on fire, and left him in a pool of blood during an after-hours robbery at Mr. Scanlon's bar. *Id.*, at 505, 653 A. 2d, at 629.

The jury found the aggravating circumstances that the killing was committed in the course of a felony and by torture, and that Rompilla had a significant history of violent felonies. See *id.*, at 514, n. 13, 653 A. 2d, at 634, n. 13. The prior crime also involved a burglary and robbery, and Rompilla raped the victim. See *id.*, at 514, n. 12, 653 A. 2d, at 633, n. 12.

The prosecutor's sentencing argument referred to the brutality of the crime, Rompilla's violent nature, his prior violent crime, and the evident motive to eliminate Mr. Scanlon as a witness. J. A. 161-167. At no time did the prosecutor say that Rompilla would be dangerous in the future or suggest the prevention of future crimes as a reason to sentence him to death.

On automatic appeal, the Supreme Court of Pennsylvania heard oral argument October 20, 1994, four months after this Court's decision in *Simmons* v. *South Carolina*, 512 U. S. 154 (1994). No *Simmons* issue is discussed in the opinion, apparently not having been raised in the appeal. The court unanimously affirmed the conviction and sentence. *Rompilla I*, 539 Pa., at 515, 653 A. 2d, at 634.

Rompilla filed a state postconviction review petition in the trial court, making a *Simmons* claim, an ineffective assistance claim, and other claims. Although the *Simmons* claim would have been considered defaulted in most states, both the trial court and the Pennsylvania Supreme Court addressed it on the merits. The trial court found *Simmons* was distinguishable, because the prosecutor had not argued future dangerousness. J. A. 259-260.

Rompilla also claimed ineffective assistance of counsel based on the attorney's failure to uncover evidence of brain damage and an abusive childhood. J. A. 262. The trial court found that counsel retained recognized experts and provided them "whatever they asked for," and they reported that Rompilla had no brain damage. J. A. 263-264. Further, the trial court found that counsel's testimony that they had interviewed Rompilla's family in detail was credible, J. A. 264, and the family's testimony was not. J. A. 264-265.

The Pennsylvania Supreme Court affirmed, with a single dissent. *Commonwealth* v. *Rompilla*, 554 Pa. 378, 721 A. 2d 786 (1998). The court rejected both claims on reasoning similar to the trial court. See *id.*, at 385, 394-395, 721 A. 2d, at 789-790, 794-795.

Rompilla then sought federal habeas relief. See *Rompilla* v. *Horn*, 2000 U. S. Dist Lexis 9620 (E. D. Pa. 2000) The District Court found that the ineffective assistance claim was "a very close call," *id.*, at *39, but nonetheless found that the state court had "unreasonably applied" the *Strickland* standard. *Id.*, at 40. There is no explanation of how a decision either way in a "very close" case can possibly be unreasonable. The District Court rejected the *Simmons* claim, because the prosecutor's argument went to the circumstances of the crime and not to future dangerousness. See *id.*, at *44-45.

The Third Circuit reversed the grant of habeas relief on the penalty phase. *Rompilla* v. *Horn*, 355 F. 3d 233 (CA 3 2004) with one judge dissenting. This Court granted certiorari on September 28, 2004.

SUMMARY OF ARGUMENT

In cases governed by 28 U. S. C. § 2254(d)(1), the distinction between new rules and applications of old rules to new facts is not critical, as it is under the *Teague* rule. By applying the new deference standard to both questions of law and mixed questions of law and fact, Congress has required that objectively reasonable decisions of state courts of either type be respected on federal habeas corpus.

In 1998, it was entirely reasonable for a court to believe that *Simmons* did not apply when the prosecutor introduced evidence and made arguments directed toward the retribution basis for capital punishment, even though the same evidence would, in nearly all cases, enable the jury to infer an incapacitation rationale as well. Otherwise, the requirement that *Simmons* indicated was an exception would swallow the general rule. Although the exception *did* swallow the rule in *Kelly* in 2002, the fact that four Justices dissented in *Kelly* is strong evidence that the contrary view was reasonable.

The Sixth Amendment does not require a "scorched earth" investigation of every conceivably mitigating piece of evidence in every capital case. Under *Strickland* v. *Washington* and *Burger* v. *Kemp*, the most pertinent precedents available at the time of state court decision, counsel's decision not to pursue a line of investigation, based on information from both the defendant and his family that it would be fruitless, was a reasonable conservation of limited resources. The state court's decision to that effect was a reasonable application of *Strickland*.

American Bar Association standards do not establish the minimum required representation under the Sixth Amendment. This Court explicitly so held in *Jones* v. *Barnes*, and that decision should be reaffirmed. In criminal law generally and capital punishment particularly, the ABA is an advocate for one side of the debate, and it should not be allowed to dictate the allocation of limited public resources.

ARGUMENT

I. Four years before the 5-4 decision in *Kelly*, a decision congruent with the *Kelly* dissent was neither contrary to nor an unreasonable application of clearly established federal law.

A. Reasonableness.

Prior to 1994, it was the law in many states that it was improper to instruct the jury in any case " 'of the possibility of commutation, pardon, or *parole*.' " *O'Dell* v. *Netherland*, 521 U. S. 151, 163 (1997) (quoting *California* v. *Ramos*, 463 U. S. 992, 1013, n. 30 (1983) (emphasis added in *O'Dell*)). The choice of whether to inform the jury was a prerogative retained by the States. See *id.*, at 164.

Simmons v. *South Carolina*, 512 U. S. 154 (1994) created a new rule. See *O'Dell*, *supra*, at 166. Because there was no opinion for the Court in *Simmons*, the rule of that case is the position of the opinion concurring in the result on the narrowest ground. See *id.*, at 162; *Marks* v. *United States*, 430 U. S. 188, 193 (1977). Although applying *Marks* can be difficult in some cases, see, *e.g.*, *Grutter* v. *Bollinger*, 539 U. S. 306, 325 (2003), it is straightforward here. The "prevailing opinion" in *Simmons* is Justice O'Connor's. See *Kelly* v. *South Carolina*, 534 U. S. 246, 258 (2002) (Rehnquist, C. J., dissenting).

A precedent creates a rule of law by requiring that future cases which are not distinguishable in their material facts be decided with the same result. The "rule" of a case consists of

the criteria for deciding which facts are material. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Grutter* v. *Bollinger*, No. 02-241, http://www.cjlf.org/briefs/Grutter.pdf, pp. 7-8. The opinion concurring on the narrowest grounds defines a subset of cases which a majority agrees is like the case before the court and must be decided the same way.

In *Simmons* there is no doubt that the prosecutor's argument on future dangerousness was a material fact in the decision and essential to the result. "[I]f the prosecution does not argue future dangerousness, the State may appropriately decide that parole is not a proper issue for the jury's consideration . . . ." 512 U. S., at 176 (O'Connor, J., concurring in the judgment).

In *Simmons*, the prosecutor's future dangerousness argument was express and unambiguous. See *id.*, at 157 (plurality opinion). In *O'Dell*, not only was the argument unambiguous, but future dangerousness was a statutory aggravating circumstance the jury was instructed to decide. See 521 U. S., at 154. *O'Dell* and *Simmons* itself were the only Supreme Court cases on the *Simmons* rule in 1998, when the Pennsylvania Supreme Court decided Rompilla's *Simmons* claim.

Amicus NACDL insists that *Kelly* was only an application of *Simmons* and not a new rule. Brief for National Association of Criminal Defense Lawyers on *Amicus Curiae* 7-12 ("NACDL Brief"). Prior to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), this would have presented a difficult question. The rule of *Teague* v. *Lane*, 489 U. S. 288 (1989) applies to rules of law but not to applications of existing rules to particular facts, and the line between the two has not always been easy to draw. See *Wright* v. *West*, 505 U. S. 277, 308-309 (1992) (Kennedy, J., concurring in the judgment). Congress addressed the *Wright* conundrum by making the new deference standard applicable to "mixed questions" as well as pure "rules." See *Williams* v. *Taylor*, 529 U. S. 362, 407-408 (2000). Indeed, multiple supporters of the habeas reform expressly referred to application of the law to the

facts as being within the scope of the new deference standard. See *id.*, at 408, n. *.

As this is an AEDPA case and not a *Teague* case,[2] the new rule/application question is a distinction without a difference. The case comes down to the objective reasonableness of the state court decision, based on this Court's precedents at the time, whichever prong is applied.

Existing Supreme Court precedent does not "clearly establish[ ] Federal law" to which a state court decision can be "contrary," 28 U. S. C. § 2254(d)(1), unless the "holdings, as opposed to the dicta," of the cases constitute an "old rule" within the meaning of the *Teague* line of cases. *Williams*, 529 U. S., at 412; see also *Yarborough* v. *Alvarado*, 541 U. S. __, 124 S. Ct. 2140, 2150-2151, 158 L. Ed. 2d 938, 953 (2004) (noting similarity of § 2254(d) and *Teague* regarding extending existing rules). General principles from which a rule may be derived are not a rule for this purpose. See *Sawyer* v. *Smith*, 497 U. S. 227, 236 (1990). Where the contours of a rule are unclear, a decision that a materially distinguishable set of facts is not within the rule is not contrary to clearly established law so long as reasonable minds can differ on the question, bearing in mind that reasonableness is determined objectively. See *Lockyer* v. *Andrade*, 538 U. S. 63, 73 (2003) (unclear contours); *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990) (reasonable minds); *Wright* v. *West*, 505 U. S., at 304 (O'Connor, J., concurring in the judgment) (objective standard).

Under AEDPA, unlike *Teague*, the state court's application of law to facts is *also* governed by the same kind of objective

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2. Sometimes *Teague* continues to bar a claim where AEDPA does not, as when a new rule is created after finality on direct review but before a decision on the merits on state collateral review. See *Beard* v. *Banks*, 542 U. S. ___, 124 S. Ct. 2504, 2509, 159 L. Ed. 2d 494, 501-502 (2004). This is not such a case. *Simmons* came before both dates, and *Kelly* came after both.

reasonableness standard. See *Williams*, 529 U. S., at 409-410. "Whether the prisoner seeks the application of an old rule in a novel setting," *Wright* v. *West*, 505 U. S., at 308 (Kennedy, J., concurring in the judgment), as opposed to a new rule, was a difficult question which often divided this Court. Cf. *id.*, at 313-316 (Souter, J., concurring in judgment) (finding a "new rule" when reviewing the same opinion). Congress has decided that cases will no longer turn on this difficult distinction when § 2254(d) applies. When the petitioner's case is materially distinguishable from the existing Supreme Court precedent, objective reasonableness is the standard either way.

The dispositive question in the present case is whether, four years before *Kelly*, a court was objectively unreasonable in its conclusion that the *Simmons* rule does not extend to a situation where the prosecutor did not argue dangerousness, but where the jury could very well infer dangerousness from evidence and argument which is directed to other independently legitimate sentencing factors. Only one of the four federal judges to consider the AEDPA question so far thought so, because of her belief that "even if *Kelly* 'arguably' broadened *Simmons* it is dispositive for present purposes that the majority of the Supreme Court [in *Kelly*] believed otherwise." *Rompilla* v. *Horn*, 355 F. 3d 233, 291 (CA3 2004) (Sloviter, J., dissenting). Judge Sloviter thought that the language in the *Kelly* opinion that the prosecutor " 'placed the case within the four corners of *Simmons*' " was sufficient to make *Kelly* fully applicable to this case. This view is fundamentally mistaken.

A similar argument was emphatically rejected early in the *Teague* line of cases.

> "But the fact that a court says that its decision is within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision, is not conclusive for the purpose of deciding whether the current decision is a 'new rule' under *Teague*. Courts frequently view their decisions as being 'controlled' or 'governed' by prior opinions even when aware of reasonable contrary conclusions reached by other courts. In [*Arizona* v.] *Roberson* [486 U. S. 675 (1988)], for instance, the Court found *Edwards* [v. *Arizona*, 451 U. S. 477 (1981)] controlling but acknowledged a significant difference of opinion on the part of several lower courts that had considered the question previously." *Butler* v. *McKellar*, 494 U. S., at 415.

We see the same principle at work in this Court's most recent *Teague* decision. *Beard* v. *Banks*, 542 U. S. __, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004). Even though there was language in *Mills* v. *Maryland*, 486 U. S. 367 (1988) to support the proposition that its rule was required by *Lockett* v. *Ohio*, 438 U. S. 586 (1978), it was still "clear that reasonable jurists could have differed as to whether the *Lockett* principle compelled *Mills*." 124 S. Ct., at 2512, 159 L. Ed. 2d, at 505.

Although the very existence of a dissent in this Court or of contrary prior opinions in lower courts is not proof of reasonableness, see *Williams*, 529 U. S., at 410, these opinions remain highly relevant to that determination. See *Banks*, 124 S. Ct., at 2512, 159 L. Ed. 2d, at 505; *Butler*, 494 U. S., at 415. To say that six Justices of the Pennsylvania Supreme Court were unreasonable in this case is also to say that four Justices of this Court and four of the five Justices of the South Carolina Supreme Court were unreasonable in *Kelly*. A powerful showing should be required to sustain such an assertion.

B. The AEDPA Standard.

With this guidance from the *Teague* cases on what "reasonable" means, we can turn specifically to the tests applied under §2254(d)(1). "[A] decision by a state court is 'contrary to' our clearly established law if it 'applies a rule that contradicts the governing law set forth in our cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.' " *Price* v. *Vincent*, 538 U. S. 634, 640 (2003) (quoting *Williams*, 529 U. S., at 405-406).

There can be no question that the facts of the present case are materially distinguishable from *Simmons*. The prosecutor in *Simmons* expressly argued future dangerousness, while the prosecutor in this case did not. Although *Kelly* subsequently held that difference was not determinative, at the time of the state court decision in the present case it was a distinction that reasonable jurists could and did consider decisive. See *Kelly*, 534 U. S., at 260 (Rehnquist, C. J., dissenting). In other words, it was not "clearly established Federal law" that mere implications from evidence and argument had to be treated the same as explicit argument. A conclusion that they were different was reasonable at that time, even if that view did not ultimately prevail in *Kelly*.

Nor did the state court apply a rule that contradicts the rule stated in *Simmons*. The state court cited *Simmons* for the proposition that a "without parole" instruction is required only when future dangerousness is at issue. *Commonwealth* v. *Rompilla*, 554 Pa. 378, 395, 721 A. 2d 786, 795 (1998). The court referred to its own post-*Simmons* cases for its interpretation that "at issue" means that the prosecutor argues future dangerousness. Far from contradicting the governing law stated in *Simmons*, that is *exactly* what the opinion concurring on the narrowest grounds explicitly says. See *Simmons*, 512 U. S., at 176-177 (O'Connor, J., concurring in the judgment).

The only colorable argument, then, is that the Pennsylvania Supreme Court unreasonably applied *Simmons*. To clear this hurdle, it is not enough to show that the decision would be considered incorrect and reversed under *Kelly* if it arose on direct appeal today. "Rather, that application must be objectively unreasonable." *Andrade*, 538 U. S., at 76.

There are three reasons to sentence a murderer to death: deterrence, incapacitation, and retribution, also known as "just deserts" or simply "justice." See *Gregg* v. *Georgia*, 428 U. S. 153, 183 and n. 28 (1976) (lead opinion). A future dangerousness argument is one that urges the jury to sentence

defendant to death for the purpose of incapacitation. That was the argument in *Simmons*: " ' Your verdict will be an act of self-defense . . . .' " 512 U. S., at 176 (O'Connor, J., concurring in the judgment). The Pennsylvania Supreme Court correctly understood and applied *Simmons* to cases where it found the prosecutor making such an argument. See *Commonwealth* v. *Chandler*, 554 Pa. 401, 414-415, 721 A. 2d 1040, 1046-1047 (1998) (death sentence urged " 'to stop him from ever killing another woman again' ").

Amicus NACDL refers to *Chandler* as involving "weaker facts" than the present case, see NACDL Brief 18, but the question is not whether the facts make a stronger or weaker case for the death penalty, but rather whether the argument is directed at incapacitation rather than just deserts as the rationale for imposing the death penalty. That was the argument in *Chandler*, but it was not in the present case.

The same evidence will very often support more than one rationale for the death penalty. Habitual criminals deserve more severe punishment as a matter of justice, and they are also more likely to reoffend, thereby warranting stronger incapacitation. The same is true for those who commit calculated crimes as opposed to impulsive ones. It would be a rare case indeed where the evidence supporting retribution could not also be argued in support of incapacitation. But the rule of *Simmons* was based on what the prosecutor *did* argue from the evidence, not what he *could have* argued from the evidence or what the jury could have inferred from it *sua sponte*. See *Simmons*, 512 U. S., at 176-177 (O'Connor, J., concurring in the judgment).

Petitioner complains of the prosecutor arguing that he is merciless, cruel, savage, sadistic, and violent, and that he killed the victim to prevent his testimony. See Brief for Petitioner 4-5. These are retribution arguments. These are arguments that, although all murders are heinous, this one is exceptionally so and therefore *deserving* of the most severe punishment allowed. Indeed, this is the only kind of penalty phase argument that can

feasibly be made when the prosecutor is not making an incapacitation argument. While deterrence is a powerful argument for retaining capital punishment generally,[3] it is not well suited for arguing that the penalty should be imposed in one case versus another.

Reading Justice O'Connor's opinion in *Simmons*, one could reasonably conclude that the general rule of state option remained, and *Simmons* had federalized an exception of limited scope, even in capital cases. Only two Justices in *Simmons* voted to expand the rule to all capital cases. See *Simmons*, 512 U. S., at 172 (Souter, J., concurring). For the traditional rule to remain the rule and for *Simmons* to be the exception, *Simmons* would necessarily have to be limited to cases where incapacitation is straightforwardly argued as the reason for the sentence, see *id.*, at 174 (Ginsburg, J., concurring) and not extended to cases where exceptional heinousness is argued as the basis for retribution, with incapacitation being merely an inference drawn by the jury.

Kelly effectively held that mere incapacitation implications from arguments and evidence which are directed to retribution would suffice to invoke *Simmons*. See 534 U. S., at 255. With *Kelly*, the exception *has* swallowed the rule. There is no practical difference between the law after *Kelly* and the position endorsed only by Justices Souter and Blackmun in *Simmons*. A prosecutor would be a fool to oppose a *Simmons* instruction in any post-*Kelly* capital case where life without parole is the only alternative sentence.[4] There are few, if any, convincing

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3. See, e.g., Dezhbakhsh, Rubin, & Shepherd, Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data, 5 Am. L. & Econ. Rev. 344, 373 (2003) ("our most conservative estimate is that the execution of each offender seems to save, on average, the lives of eighteen potential victims")

4. Amicus NACDL calls Pennsylvania "aberrant" for not giving the *Simmons* instruction in all cases. See NACDL Brief 22. The fact that states change their practices in fear of having their sentences thrown out

arguments to make or evidence to introduce without tripping *Kelly*'s vastly expanded definition of what places future dangerousness "at issue." The policy change that NACDL seeks has already been made for all practical purposes, whether the Constitution actually requires it or not.

The question in this case, though, is not what policy to set for the future but whether to apply *Kelly*'s gloss on *Simmons* to overturn pre-*Kelly* decisions. The answer is no. AEDPA, like *Teague*, is intended in part to limit the damage caused by the continuing expansion of constitutional criminal procedure jurisprudence. Changes which are desirable policy for future trials need not overturn judgments that are already final. Congress has commanded that decisions of state courts which are reasonable interpretations and applications of this Court's jurisprudence at the time they are rendered need not be overturned later on federal habeas corpus. This is such a case.

II. Clearly established law permits reasonable limits on penalty-phase investigation.

To prevail on his ineffective assistance claim, petitioner must show that the state courts unreasonably applied *Strickland* v. *Washington*, 466 U. S. 668 (1984) to the facts found by them. He has not argued that the state courts applied a rule contrary to *Strickland*. Despite some differences in phrasing, the Pennsylvania courts apply a standard equivalent to the federal rule. See *Commonwealth* v. *Pierce*, 515 Pa. 153, 161, 527 A. 2d 973, 976-977 (1997). Also, notwithstanding petitioner's reliance on the testimony of his family, the state PCR court found that their testimony was not credible, J.A.

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by the next twist in the "annually improvised" jurisprudence of capital punishment, see *Morgan* v. *Illinois*, 504 U. S. 719, 751 (1992) (Scalia, J., dissenting), is not proof that they think the change is good policy. See Tr. of Oral Arg. in *Roper* v. *Simmons*, No. 03-633, 48-49.

264-265, and 28 U. S. C. § 2254(e) requires deference to that finding. See *Wiggins* v. *Smith*, 539 U. S. 510, 530 (2003).

Petitioner quotes *Wiggins*, *supra*, at 524 quoting the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989), for the proposition that counsel must "discover all reasonably available mitigating evidence." See Brief for Petitioner 31. Taken to its logical extreme, this would mean that if there were a single piece of mitigating evidence that counsel did not discover, and if that piece, taken individually, had been reasonably available, then counsel would be branded ineffective, and the only question would be prejudice. If *Wiggins* had really held that, it would have overruled established precedent, and it would have done so in a federal habeas proceeding where such retroactive changes in the law are forbidden. Such a departure from the legitimate limits of habeas corpus should not be lightly inferred.

The proposition that the Sixth Amendment requires a no-stone-unturned investigation in every capital case was rejected in *Strickland* itself, a capital case. "[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." 466 U. S., at 691. The testimony of trial counsel, credited by the state PCR court, fits *Strickland*'s description of cutting off apparently fruitless investigation. See *Rompilla* v. *Horn*, 355 F. 3d 233, 252 (CA 3 2004).

The general statement of *Strickland* was given concrete application in *Burger* v. *Kemp*, 483 U. S. 776 (1987). *Burger*, like the present case, involved a decision of trial counsel to terminate investigation into background evidence. The background evidence that might have been presented as mitigating concerned the defendant's "exceptionally unhappy and unstable childhood." *Id.*, at 789. Burger's counsel "was aware of some, but not all," of the defendant's background information prior to trial. *Id.*, at 790. He did not make the kind

of exhaustive investigation that petitioner and *amicus* American Bar Association contend is invariably required by the Sixth Amendment in every case.

Burger argued that defense counsel's failure to conduct such an investigation into his background was ineffective because, if he had done so, he would have discovered much more information about defendant's troubled family background. See *id.*, at 793. This Court disagreed. "The record at the habeas corpus hearing does suggest that [defense counsel] could well have made a more thorough investigation than he did. Nevertheless, in considering claims of ineffective assistance of counsel, '*[w]e address not what is prudent or appropriate, but only what is constitutionally compelled.*'" *Id.*, at 794 (quoting *United States* v. *Cronic*, 466 U. S. 648, 665, n. 38 (1984)) (emphasis added).

In *Burger*, counsel curtailed his investigation because he believed he had learned enough to decide that the "background" defense would be contrary to and less effective than another line of defense he had decided to present. *Burger* holds that this is one valid reason to curtail a line of investigation, see *id.*, at 794-795, but it is not the only reason. Information from the defendant indicating that a line of investigation is "fruitless" is also a valid reason. See *Strickland*, 466 U. S., at 691. The simple, valid reason for terminating a line of inquiry based on a reasonable assessment that it will not bear fruit is that, in the real world, there are always limits to resources, and this statement in *Strickland* implicitly recognizes resource limitations as a valid consideration in making strategic decisions.

In *Wiggins*, the Court took care to point out that resource limitations were *not* the reason for counsel's decision not to pursue the background investigation. "Despite the fact that the Public Defender's office made funds available for the retention of a forensic social worker, counsel chose not to commission such a report." 539 U. S., at 524. Further, the *Wiggins* Court noted that the leads available to counsel indicated that there

was mitigating background evidence to be gained by such an investigation. See *id.*, at 525.

The present case is therefore the opposite of *Wiggins* in two important aspects. First, this case involves a strategic decision regarding the allocation of limited resources, while *Wiggins* did not. See 355 F. 3d, at 252. Second, Wiggins' counsel had reason to believe the background investigation would produce useful mitigation, while Rompilla's counsel had reason to believe it would not.

Even if the question of counsel's effectiveness were close on the merits, the AEDPA question is not. Given the language in *Strickland* and the holding of *Burger*, the Pennsylvania Supreme Court's decision was well within the bounds of reasonable application of this Court's precedents as of 1998. That is sufficient to preclude this collateral attack on a final judgment under AEDPA.

III. The ABA Guidelines are not constitutional minimums.

The argument that the guidelines issued by the American Bar Association establish a constitutional minimum that states and counsel must meet is not a new one. "In any event, the fact that the ABA may have chosen to recognize a given practice as desirable or appropriate does not mean that that practice is required by the Constitution." *Jones* v. *Barnes*, 463 U. S. 745, 753, n. 6 (1983).

Although it does not *quite* say so, the ABA comes very close to asking this Court to overrule *Jones*.

> "Based on this history and precedent, the ABA submits that its *Guidelines* are indicative of prevailing professional norms by which defense counsel's conduct should be evaluated for reasonableness under *Strickland*. Because they reflect professional norms that prevailed in the 1980s, the ABA guidelines are an appropriate benchmark against which counsel's conduct should be judged in this case." Brief for the American Bar Association as *Amicus Curiae* 7-8 ("ABA Brief").

To the extent that the ABA is proposing that this "benchmark" be a constitutional minimum and that any deviation be declared *per se* ineffective assistance of counsel, that proposal was rejected in *Jones* and rejected in *Strickland* v. *Washington*, 466 U. S. 668, 688 (1986) ("only guides"), and it should be rejected again in the present case.

The American Bar Association is a private organization. The people of the United States have no voice in the election of its officers or the determination of its policies. The greatest caution is therefore required when the ABA proposes that it be delegated the power to decide what is required in the courts of the nation. The requisite caution is tripled when the issue to be decided involves the allocation of always-scarce public funds.

The ABA is the nation's largest lawyers' organization and among the oldest. See ABA Brief 1. It was once held in nearly universal regard as the voice of America's lawyers, and, although it has fallen considerably from that pinnacle, it still occupies a position of prestige in the eyes of many. Even so, the interests of the ABA are not the interests of the American people. The ABA has its own interests and its own agenda. In the guise of promulgating standards, it must not be delegated the power to allocate public resources or to force its policy preferences on an unwilling public by pricing its disfavored choice out of the people's fiscal reach.

The ABA's authority is at its zenith when it speaks to restrain lawyers for the protection of the public. Because much of the ABA's standards on ethics follows these lines, they are often adopted and given legal force by government bodies. Conversely, the ABA's authority is at its nadir when it seeks to advance the interests of its members against others. The misuse of the ABA's law school accreditation authority to force salary increases for law faculties brought a government antitrust suit,

a consent decree, and a permanent injunction. See *United States* v. *American Bar Assn.*, 934 F. Supp. 435, 436 (DC DC 1996), aff'd 118 F. 3d 776 (CA DC 1997).

By requiring a "scorched earth" investigation in every capital case, the ABA would force governmental bodies to allocate more resources for criminal defense, which inevitably means fewer resources for other worthy governmental purposes. If the cost is driven high enough, governments may be forced to abandon a sentencing policy that they believe is both necessary for justice and invaluable for saving innocent lives through deterrence. The ABA's position raises the strong suspicion that this is the real agenda.

Filing in support of the criminal defendant in the present case, the ABA continues its uniform record over many years of *always* supporting the defendant against the prosecution whenever it appears in this Court in a criminal case. Over twelve years ago an ABA committee warned of the danger of this persistent partisanship:

> "The American Bar Association historically has been an umbrella organization, representing a wide variety of viewpoints from all aspects of the legal profession. Its ethical rules, criminal justice standards, and other contributions to American law have traditionally represented the consensus product of the most experienced and responsible members of the profession.
>
> The ABA's unique status, however, is in grave danger, at least as to criminal justice issues. Prosecutors have been increasingly alienated from the ABA, and many are publicly rejecting not merely the ABA's policies but the very legitimacy of the organization's role in promulgating those policies. Reduced to its simplest terms, most prosecutors now perceive that the ABA has become captive to the narrow adversarial interests of the criminal defense bar."

American Bar Association Advisory Committee on the Prosecution Function, Prosecutors and the ABA 1 (1992).

The problem has only worsened since then. The ABA's claim "that it takes no position on the death penalty as a general matter," ABA Brief 2, is a veneer which is transparent to everyone involved in this debate. Its efforts are invariably directed at blocking the execution of justly imposed death sentences, never toward removing the obstructions. As an advocate for one side of the debate, the ABA has as much right to express its view as any other advocate. That view, however, should not be given the force of law, especially not constitutional law.

Thirty-eight states and the federal government have decided that capital punishment serves vital interests in protecting the public and administering justice. That is their decision to make, however much the ABA disagrees with it. To implement this decision, the government must allocate the resources for the representation of indigents that the Sixth Amendment *actually* requires. This Court, not the American Bar Association, must determine the constitutional minimum. The duty is not delegable.

Jones v. *Barnes* wisely and correctly held that ABA standards do not determine the constitutional minimum. That holding should be clearly and unequivocally reaffirmed.

CONCLUSION

The decision of the Court of Appeals for the Third Circuit should be affirmed.

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Respectfully submitted,

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